8-1700-9122-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by David Beaulieu, Commissioner, Department of Human Rights,

Complainant,

v.

Lloyd A. Wallin,

Respondent.

ORDER ON MOTION FOR RECONSIDERATION

On January 26, 1995, an Order was issued granting Complainant's Motion for Partial Summary Disposition on the issue of liability for retaliatory discrimination, but the issue of damages, if any, was not resolved. On February 9, 1995, Respondent filed a Motion for Reconsideration of that Order. Complainant filed objections to the Motion for Reconsideration on February 24, 1995.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED:

1. Respondent's Motion for Reconsideration should be and is hereby GRANTED.

2. The January 26, 1995 order granting Complainant's Motion for Partial Summary Disposition should be and is hereby VACATED.

3. A prehearing conference will be held commencing at 1 p.m. on April 7, 1995 at the Office of Administrative Hearings.

Dated this 24th day of March, 1995

JON L. LUNDE
Administrative Law Judge

Reported: Taped

MEMORANDUM

I.

The Charging Party, Renae Smith, was employed by Respondent as a dental hygienist. She quit this employment on August 28, 1991 and gave written notice of her termination on September 11, 1991. In her September 1991 resignation note, she stated that she was quitting due to "sexual harassment and a hostile environment at the workplace." After quitting, Smith filed a claim for unemployment insurance benefits on September 18, 1991. In her unemployment claim form, Smith wrote that she quit her employment because Respondent had "patted me on my posterior." She said he later denied that he had touched her improperly and had become intimidating.

On or about September 27, 1991, Smith also filed a complaint against Respondent with the Minnesota Board of Dentistry alleging that Respondent had sexually harassed her. Ex. D. Her complaint reiterated the statements made in her unemployment insurance claim form.

On October 2, 1991, the Charging Party filed a charge of sex discrimination against Respondent alleging a violation of the Minnesota Human Rights Act (Act). In her charge, Smith alleged, among other things, that Respondent had inappropriately touched her at work. On January 21, 1993, the Department found probable cause to believe that Respondent had engaged in an unfair discriminatory practice against Smith. Respondent requested reconsideration of the probable cause determination, and on June 11, 1993, the probable cause determination was affirmed. On June 17, 1993, Respondent wrote to the Deputy Commissioner asking for an opportunity to present his case to a judge. That request was denied.

In spite of the Department's probable cause determination, no action or proceeding was commenced by the Commissioner. The Commissioner concluded that further use of the Department's resources was unwarranted and the charge was dismissed by letter dated August 4, 1993. In the dismissal letter, the Department's Deputy Commissioner, Tracy Elftmann, found that the costs and risk of litigation outweighed the financial benefits to the Charging Party or the benefits to the state. In the dismissal letter, Smith was advised that she could bring a civil action against Respondent in District Court within 45 days if she chose. Smith brought no such action within the time allowed.

In a letter dated June 15, 1994, Respondent asked the Commissioner of Human Rights for a hearing on the Smith's charges before an Administrative Law Judge. No hearing was scheduled. On September 15, 1993, Respondent filed a Complaint against the Charging Party alleging that she had defamed him. The Complaint was filed in the Scott County Conciliation Court. It alleged:

> The defendant [Charging Party], an experienced registered dental hygienist, made repeated, malicious, written and verbal statements about the plaintiff [Respondent] that she knew were false. This was done in an attempt to make money and harm the reputation of the plaintiff in the professional community.

The Complaint stated that the Charging Party defamed Respondent in a written statement submitted to the Department of Jobs and Training, a written statement submitted to the Minnesota Board of Dentistry, the written charge she filed with the Department of Human Rights, and in alleged statements the Charging Party made to former employees of the Respondent.

In his complaint, Respondent requested $10,388 in compensatory damages which included lost income from attending unemployment insurance proceedings, attorneys fees, medical expenses, lost income from Smith's termination, and other costs and disbursements. In addition, he requested punitive damages of $4,500 relating to the allegedly false statements Smith made to the Department of Economic Security, the Department of Human Rights, the Board of Dentistry, and Respondent's employees.

On January 26, 1994, Smith filed a charge of reprisal discrimination against the Respondent alleging that the Scott County Conciliation Court suit was retaliatory and violated Minn. Stat. § 363.03, subd. 7(1). On or about February 9, 1994, the Commissioner found probable cause to believe that the Respondent had engaged in a prohibited reprisal in violation of the Minnesota Human Rights Act. The Commissioner, believing that conciliation would not be productive, referred the matter to the Attorney General's Office for litigation.

On March 10, 1994, the Conciliation Court Complaint was dismissed without prejudice for lack of subject matter jurisdiction.

In his Order of January 26, the Administrative Law Judge found that Complainant established a prima facia case of retaliatory action and that Respondent had failed to present evidence of any material facts in dispute. Consequently, Complainant's Motion for Partial Summary Disposition was granted. Respondent requests reconsideration. Complainant opposes that request.

II.

Complainant argued that a motion for reconsideration may only be filed with the Administrative Law Judge after the record has closed and a report has been issued. It cited Minn. Rules pt. 1400.8100 and 1400.8300 (1993). That argument must be rejected. Part 1400.8300, which governs reconsideration and rehearing, is inapplicable. The rule only addresses reconsideration of final decisions or recommendations, as is evinced by the rule's reference to "reports". The rule has no application to interlocutory orders.

Although the contested case rules do not specifically mention motions to reconsider interlocutory orders, it does not follow that such motions are unauthorized. On the contrary, Part 1400.6600, which generally authorizes motion practice in contested cases, states that when the contested case rules are silent the Rules of Civil Procedure for the District Courts should be applied when ruling on motions. Hence, in determining whether reconsideration is authorized, the civil rule should be consulted.

Under the civil rules, orders granting or denying partial summary disposition may be reviewed and modified at any time prior to entry of a final judgment or order. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Zimzares v. Veterans Administration, 778 F.2d 264, 266 (5th Cir 1985); Warner Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231, 245 (2nd Cir. 1983). See also, 6 J.Moore, W. Taggert and J. Wicker, Moore's Federal Practice ¶ 56.26-1 at 56-846. A court's general authority to revise, modify or vacate orders on motions for partial summary disposition is discussed in 35B. C. J. S. Federal Civil Procedure, § 1235, which states, in part, that "until the entry of final judgment, interlocutory orders, judgments, and decrees remain subject to the complete power and control of the court in which they were rendered. That court retains complete power to review, reconsider, and reform them, and to

afford such relief as justice requires; and this is in accord with the practice existing prior to the adoption of the Federal Rules of Civil Procedure."

The power to reconsider an order on motion for summary disposition may be exercised even if a motion for reconsideration is not filed, and reconsideration should be granted when doing so promotes effective judicial administration. 6 J. Moore, W. Taggert and J. Wicker, Moore's Federal Practice ¶ 56.14[2] p. 56-194 (2d ed. 1988). This power is explicitly recognized in Rule 54.02 Minn.R.Civ.P. which states:

> When multiple claims for relief for multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Under the federal counterpart to the cited rule, it has been held that an order denying summary judgment on all claims is subject to revision at any time before entry of judgment as to all claims, and that such an interlocutory order may be reconsidered upon the presentation of a renewal motion. Warner Bros., v. American Broadcasting Cos., supra, 720 F.2d at 245. Accord, Pederson v. Rose Co-op Creamery Ass'n, 326 N.W.2d 657, 660 (Minn. 1982). Under these authorities, it is clear that an order denying or granting partial summary disposition is reviewable prior to entry of a final order. Hence, the Complainant's argument that no authority exists to reconsider the order granting Complainant's Motion for Partial Summary Disposition must be rejected. It is further concluded that it is appropriate to reconsider the Department's Motion for Partial Summary Disposition so that Respondents' liability, if any, will be determined on the merits of the case and not on defects in Respondent's objections to the Motion.

III.

In E.E.O.C. v. Virginia Carolina Veneer Corp., 495 F.Supp. 775 (W.D. VA 1980), app. dismd, 652 F.2d 381 (4th Cir. 1981) the court held that an employer who filed a defamation suit against its former employee which was based solely on the employee's having filed a sex discrimination charge against the employer constituted impermissible retaliation. In describing the defamation suit, the court stated (at 777):

> The sole allegation in defendant's state court defamation complaint was that Mrs. Cassidy defamed defendant by making "certain written allegations. . that she had been discriminated against by Virginia Carolina Vaneer Corporation because of her sex" to the United States Department of Labor, Employment Standards Administration, and to the Equal Employment Opportunity Commission. No other defamatory writings, statements or actions were alleged in defendant's state court action. This allegation in defendant's pleading clearly constitutes an admission of a retaliatory motive. Consequently, there exist no material facts at issue in this action.

The court went on to hold that an absolute privilege exists for the filing of a discrimination charge and it granted summary judgment against the employer. It also required the employer to take a nonsuit in its state defamation action.

Unlike Virginia Carolina Veneer, Respondent's defamation action was not based "solely" on Smith's discrimination charge. Furthermore, the defamation action was not commenced until all proceedings before the Department had been concluded and Respondent's request for a hearing to challenge the probable cause finding was rejected.[1]

In E.E.O.C. v. Levi Strauss & Co., 515 F.Supp. 640 (N.D. Ill. 1981) a federal court, in deciding whether it should enjoin a state court defamation action which was allegedly filed in retaliation for protected conduct under Title VII of the Civil Rights Act of 1964 held that a state court defamation action filed in retaliation for protected conduct may be enjoined but that an action filed in good faith by the employer in an attempt to vindicate its reputation should not be enjoined. In reaching its decision, the court stated:

> There is no authority for the proposition that Title VII, sub silentio, preempts all state defamation proceedings. Rather, the exact opposite was recognized in Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969). In Pettway, the Fifth Circuit considered the filing of charges with the Commission protected activity under § 704(a) and held that an employer who discharged an employee for filing false and malicious charges with the EEOC violated the Act. The Pettway court stated, however,:
>
> > We in no way imply that an employer is preempted by Section 704(a) from vindicating his reputation through resort to a civil action for malicious defamation.
>
> Pettway v. American Cast Iron Pipe Co., 411 F.2d at 1007, N.22. Cf. Linn v. PlanGard Workers, 383 U.S. 53 . . . .

Accord Proulx v. Citibank, N.A., 659 F.Supp. 972, 978-79 (S.D.N.Y. 1987) (Employer's remedy for defamation is to defeat claim on its merits and then sue for defamation).

The issue raised by Complainant's Motion is whether the defamation action Respondent commenced was filed in retaliation for protected conduct or whether it was filed in good faith by the Respondent in an attempt to vindicate his reputation. This is a factual issue which is not well suited for disposition on motion for summary judgment. Arthur Young & Co. v. Sutherland, 631 A.2d 354, 368 (D.C. App. 1993).

In the affidavit Respondent filed in support of his Motion for Reconsideration, Respondent stated: "My only reason for bringing an action against Renae Smith was to try and remove the finding of "probable cause" from the DHR dismissal of August 4, 1993. I was lead to believe that the BOD would use this finding against me." The record contains other evidence suggesting that the defamation action was begun by Respondent to clear his name and prevent adverse licensing action by the Board of Dentistry (BOD). Based on the Respondent's affidavit and a review of other evidence in the file, the Administrative Law Judge is persuaded that Respondent has raised a genuine issue of material fact with respect to the reasons for bringing the defamation action against Smith and that the reasons he asserted, if true, constitute a legitimate nondiscriminatory reason for that action. Therefore, Respondent's Motion for

Reconsideration should be granted and the Order granting Complainant's partial summary disposition should be vacated.

There is some suggestion that Smith's statements to the Department of Economic Security or the Department of Human Rights are absolutely privileged. Some of the cases relating to the privileged nature charges filed with the Department of Human Rights were mentioned in the Judge's prior Order. It is likely that Respondent has no cause of action against the Charging Party for information provided to the Department of Economic Security (formerly Jobs and Training) by the Charging Party prior to or at the time of hearings held in connection with her unemployment insurance claim. Minn. Stat. § 268.12, subd. 12(j) states, in part:

> Data gathered by the department [Economic Security] pursuant to the administration of sections 268.03 to 268.231 shall not be made the subject or the basis for any suit in any civil proceedings, administrative or judicial, unless the action is initiated by the department.
>
> Testimony obtained under subdivision 13 [pertaining to hearings] and section 268.10, subdivision 3, may not be used or considered in any civil, administrative, or contractual proceeding, except by local, state or federal human rights group within enforcement powers, unless the proceeding is initiated by the department.

Under the statute, all oral and written communications the Charging Party made to the Department are absolutely privileged even if known to be false and made with malice. See e.g., Circus, Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101 (Nev. 1983).[2]

Even if some of the communications made by the Charging Party are privileged, there is no reason to believe that statements she made to former employees of the Respondent are of a privileged nature. Hasten v. Phillips Petroleum Co., 640 F.2d 274, 279 (10th Cir. 1981). Furthermore, assuming that some privileges exist, the mere existence of the privilege does not establish that the suit Respondent commenced in conciliation court was filed in retaliation for protected activity. If a privilege exists, it merely means that the civil proceeding must be dismissed to the extent that it is based on communications which are subject to an absolute privilege. It does not necessarily mean that the case was commenced for retaliatory reasons.

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[1] It hasn't been argued that Respondent had a right to challenge the probable cause determination on the grounds, for example, that his liberty interests were involved. See generally, 16C C.J.S., Constitutional Law, § 980.

[2] An absolute privilege also exists as to matter published in the course of a judicial or quasi-judicial proceeding. See generally, 53 C.J.S., Libel and Slander, § 71. Furthermore, the general rule is that communications to a licensing authority regarding a person subject to its jurisdiction is at least conditionally privileged. Id at § 85. However, complaints alleging misconduct by an attorney or a judge are generally held to be absolutely privileged. Id at § 71(b).